Office of the Director of Public Prosecutions

E-Newsletter

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'To No One Will We Sell, To No One Deny or Delay Right or Justice'

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IN THIS ISSUE:

The views expressed in the articles are those of the particular authors and should under no account be considered as binding on the Office.

EDITORIAL

Dear Readers,

It is with the same enthusiasm that we bring to you the 62nd edition of our monthly newsletter. In this issue, the Director of Public Prosecutions, Mr Satyajit Boolell, SC, grapples with the quandary pertaining to the use of information and communication technologies, especially in view of the litany of messages transmitted daily on social media.

You will also read in this issue on the visit of young professionals from Madagascar to the Office of the DPP, under the "Youth Leadership Training Program" (YLTP) whereby they were provided with an insight on the manner in which the Office of the DPP operates as well as an overview on the legal system of Mauritius. Moreover, a review is provided on the Anti-Corruption course/workshop for Judges and Prosecutors attended by our law officers recently at the International Law Enforcement Academy (ILEA) in Gaborone, Botswana. Our Training Unit has recently carried out a two days' training sessions with law enforcement officers and prosecutors in Rodrigues, in collaboration with the Rodrigues Regional Assembly, an account of which is provided at page 5.

We also extend our congratulations to the 34 new barristers who have been called to the bar on 23rd September 2016, a few among whom did their pupillage at the ODPP. In this bid, the Bar Council has organised a Bar Induction Ceremony on Friday 7th October 2016. Moreover, we congratulate our Head Office Care Attendant, Mr Steeve Isbester, for obtaining a Bronze Ranking in RING Theoretical Technical Knowledge and Ability from the World Association of Kickboxing Organisation WAKO.

Finally, as usual readers will get the opportunity to go through the summaries of recent Supreme Court judgments in this issue. We do hope that you have a pleasant read.

Miss Anusha Rawoah
State Counsel

Une double victimisation

La circulation d'un clip à caractère pornographique impliquant une fille de treize ans nous interpelle au plus profond de nous même. L'île Maurice n'est ni une nation de voyeur ni une nation de pervers. Malgré toute notre panoplie législative protégeant l'enfant et limitant l'accès et la transmission des vidéos obscènes impliquant des mineurs, il est surprenant que ce clip pornographique, en si peu de temps, ait pris des proportions virales.

Par voie de conséquence, on peut en déduire que notre jeunesse reste largement inconsciente ou indifférente aux torts immenses causés à cet enfant et à ses parents sans mentionner les risques pénaux auquels elle s'expose.

La **Section 46 (h)** de la **Information and Communication Technologies Act (ICTA)** réprime la transmission et la réception des images à caractère obscène ou plus gravement pornographique. Ladite infraction est punie d'une peine maximale d'amende Rs 1 Million et une peine d'emprisonnement allant jusqu'à 5 ans. Force est de constater que malgré le fait que le bureau du DPP ait entamé un nombre non- négligeables de poursuites sous l'égide de ladite section, la persistance de la commission de ce type d'infraction reste inquiétante.

Parallèlement on peut se poser la question sur le rôle des opérateurs d'internet et des réseaux sociaux ainsi que celui du régulateur des services de télécommunications et leurs responsabilités sur la transmission des vidéos à caractère obscène et indécent impliquant des enfants.

La **section 32 (5)** de **L' ICTA** ne peut être plus explicite car il permet à l'opérateur et à ses agents d'intercepter et de retenir un message à caractère abusif ou indécent et cela ne requiert même pas un ordre du juge en chambre. Cette disposition de ladite loi est contemplée par **l'article 12(2)** de notre **Constitution** qui permet de restreindre la liberté d'expression pour précisément protéger la réputation et le droit à la vie privée. Plus spécifiquement l'article prévoit de règlementer les transmissions par voie électronique. A titre d'exemple, au mois de Septembre de cette année Facebook a pris la courageuse décision d'enlever la publication d'une photo historique néanmoins poignante (datant du 8 juin 1972) montrant une jeune fille vietnamienne nue et grièvement blessée, fuyant un bombardement au napalm lors d'un conflit sanglant vietnamien.

Le tort causé à une jeune enfant par la circulation de ses images touchant son intimité peut avoir des conséquences irréversibles. Elle peut être victime de plusieurs formes d'harcèlement et son image peut se retrouver sur des réseaux pédophiles . L'éducation de notre jeunesse, la prévention et l'utilisation des outils prévus dans notre arsenal législatif de même que notre conscience demeurent nos meilleurs atouts pour éviter que de tels cas se reproduisent dans l'avenir sinon chaque cas d'abus sexuel filmé ou photographié n'engendra qu'une double victimisation.

Mr Satyajit Boolell, SC
The Director of Public Prosecutions

Anti-Corruption workshop in Botswana

The U.S Department of State's International Law Enforcement Academy (ILEA) in Gaborone, Botswana hosted a one week Anti-Corruption course/workshop for Judges and Prosecutors from August 22-26, 2016. The objectives of this workshop were to provide quality training and institution building assistance to combat transnational crimes (main focus on corruption) and to strengthen cooperation amongst the law enforcement communities of Botswana, the United States and other African countries. The invited countries were: Botswana, Kenya, Lesotho, Malawi, Mauritius, and Namibia.

Apart from us, Mrs I.Ramburrun, Intermediate Court Magistrate, Ms S.Ganoo, Senior District Magistrate and Mr Jheelan, District Magistrate formed part of the Mauritian delegates.

This Anti-Corruption course was focused on the investigation of complex corruption cases and the target audiences were Prosecutors and Judges. The course was designed to afford an interactive forum on a range of topics to include international standards in the fight against corruption; tools in the fight against corruption, including criminal versus civil enforcement; encouraging the reporting of corruption crimes; effective use of cooperators and informants; developing a cooperative relationship between prosecutor and investigator; the challenges of collecting evidence, especially from overseas financial institutions; the organization and presentation of complex cases in court and combatting corruption through asset recovery.

A presentation was given by all the members of the participant countries in relation to their respective anti-corruption legal framework, court system and corruption cases.

The workshop was conducted by expert investigators from the US who have handled such complex cases and it encouraged close working relationships with the instructors and the fellow criminal justice practitioners.

Mrs Leelamanee Jeewon-Neeraye, State Counsel
Mrs Dushuina Pyndiah-Moorghen, State Counsel

Visit of the "Youth Leadership Training Program" participants at the ODPP

The Office of the Director of Public Prosecutions (ODPP) welcomed on 26th August 2016, a delegation of participants of the "Youth Leadership Training Program" (YLTP) who were in Mauritius for a study tour. The delegation consisted of National Representatives of Madagascar. These young contributors were professionals of 25-38 years, from different areas such as civil society, media, psychology, private sector, medicine, law, public sector, amongst others. The goal of the programme is to encourage the emergence of new generations of Madagascar who are engaged in developing the required technicalities as well as a sense of ethics.

The main purpose of their visit at the ODPP was to exchange information on the functioning and role of the ODPP as the main actor of good public governance in Mauritius. A presentation was conducted by Ms. Kevina Poollay Mootien in which she enlightened the audience about the functions and powers of the Director of Public Prosecutions under the Constitution of Mauritius, the structure of the ODPP and emphasis was also laid on how is the decision of whether to prosecute or not taken. From their feedback, the audience reiterated that they are impressed by our prosecution process and the independence of the ODPP. The presentation also covered the different Units that fall under the ODPP and which include amongst others the: Piracy Unit, Victim and Witness Support Unit, Serious Fraud and Tax Evaluation Unit, International Cooperation / Mutual Legal Assistance and Extradition Unit, Publication and the Cybercrime Unit. Ms Mootien also provided an overview of the various publications made by the ODPP, namely the monthly Newsletter, the Mauritius Criminal Law Review, "Tanya So Zistwar" and "Dans Le Noir," and she also briefed the contributors about the range of trainings provided by our law officers and international trainings attended by them. During their visit to the ODPP, the delegation of participants offered three publications that are available for consultation at the library and which are entitled: 'Politika. Le long chemin de croix de Madagascar'; 'L'africanité en question' and 'Migration et Nationalité à Madagascar'.

Domun Pooja
Legal Research Officer

Trainings to law enforcement officers and prosecutors in Rodrigues

As part of its ongoing training programme, the Training Unit of the Office of the Director of Public Prosecutions has, on 15th and 16th September 2016, in collaboration with the Rodrigues Regional Assembly, carried out a two days' training session on 'Prosecution' with the law enforcement officers and prosecutors in Rodrigues. Topics covered by our law officers for the training included the legal framework governing the Rodrigues Regional Assembly, an overview of the legal system in Mauritius, investigation techniques as well as conduct of prosecutions in court.

During the interactive training sessions, our law officers addressed the various legal issues faced by prosecutors during performance of their duties and discussions also took place on evidence gathering techniques. The aim of the training was to better equip law enforcement officers and prosecutors of Rodrigues with knowledge on investigation techniques as well as providing an overview on the prosecution process and the duties of prosecutors in Court.

List of new callees to the Mauritian Bar: September 2016

The Mauritius Bar Association has, since 23th September 2016, 34 new members. They are:

1. Nazeer Kurrimbaccus
2. Padmini Bheekharry
3. Mithila Seebaluck
4. Priyal Bunwaree
5. Diksha Lumbini Beeharry
6. Vipin Raj Jeerakun
7. Shahila Deena Bhoyroo
8. Manesha Motee
9. Mohamad Bilaal Oozeerally
10. Bhashika Gansam
11. Warda Zehra Peerally
12. Narayen Poonisamy
13. Nikhil Boolell
14. Mohammad Adil Jhungeer
15. Bibi Zuleka Noushreen Mutty-Suhootoorah
16. Mohammad Fayyaad Khan Arzamkhan
17. Medina Sarah Torabally
18. Poojanjali Gya
19. Deepti Thakoor
20. Sahirun Subadar Agathee
21. Rubesh Vishwa Doomun
22. Pooja Luchmun
23. Dayanidhee Fowdur
24. Nahida Damry
25. Véronique Marie-Thérèse Marcelle Aliphon
26. Vinesh Boodhoo
27. Dilruba Naoshin
28. Sandy Christ Bhaganooa
29. Kaleyevanee Nursiniloo
30. Sheren Govinden
31. Usha Bhurtun
32. Percy Armand Fitzgerald Louis
33. Krishen Luximon
34. Premika Devi Buchoo

The Office of the Director of Public Prosecutions congratulates the new barristers especially Ms Buchoo, Ms Motee, Ms Bhoyroo, Mr Boolell, Mr Doomun, Mr Oozeerally and Mrs Mutty-Suhootoorah, who were pupils at the Office.

We would also like to extend our hearty congratulations to our Head Office Care Attendant, Mr Steeve Isbester, for obtaining a Bronze Ranking in RING Theoretical Technical Knowledge and Ability from the World Association of Kickboxing Organisation WAKO.

CERTIFICATE

This is to certify that

Isbester Steeve

Has met the required standard of RING Theoretical Technical Knowledge and Ability as established by the World Association of Kickboxing Organization WAKO and Official Referee Committee with a Bronze Ranking.

And is hereby eligible to attend the WAKO Official Technical Seminar

Recorded on the 29th day of August, 2016

Yury Lakhtikov, Chairman Referee Committee - RING WAKO

Borislav Pribvic President WAKO

SUMMARY OF SUPREME COURT JUDGMENTS: August 2016

DEEPCHUND P R v THE STATE 2016 SCJ 326

Hon. E Balancy Senior Puisne Judge & Hon. S Peeroo Judge A A Caunhye

Drugs, alibi, duty of police officers to verify alibi

The appellant was charged before the Supreme Court with having, as a trafficker, wilfully, unlawfully and knowingly in a place outside Mauritius done an act preparatory to the importation into Mauritius of 619.8 grams of Heroin contained in 62 pellets concealed in the body of one Rijanirina Jose Alain Andriamanga, a Malagasy national, in breach of **sections 29(2)(b), 30(1)(b), 41(3)(4),47(2)** and **(5)(a)** of the **Dangerous Drugs Act**. After considering the evidence adduced, the learned Judge found the appellant guilty of the charge and sentenced him to undergo 38 years penal servitude and to pay a fine of Rs 200,000 and costs.

One of the grounds of appeal was that the Learned Judge misdirected himself on the issue of the burden of proof in respect of the alibi defence.

It is a well-established principle that where an accused party raises an alibi, the police have to investigate and verify adequately the alibi. Although there is no statutory provision in that respect, the accused party when raising alibi as a defence cannot simply say that he was somewhere else than at the place of the crime. In order to assist the police to make a meaningful investigation, the accused party has, at the stage of the enquiry, to communicate the necessary particulars of his whereabouts at the time of the offence and of those persons who were present with him at the material time. If, after verification of the alibi, the police decide to proceed with the prosecution of the accused party, they have to bring the necessary evidence in rebuttal of the alibi raised by him, since the burden is on the prosecution to prove its case beyond reasonable doubt. This burden never shifts. In addition to having to prove beyond reasonable doubt that the accused

party was at the scene of the crime, the prosecution must adduce evidence to prove all the other elements of the crime beyond reasonable doubt.

Failure to investigate adequately the alibi can be fatal to the prosecution, especially in the absence of direct and unassailable evidence fixing the accused party at the scene of the crime and proof beyond reasonable doubt that the accused party committed the offence. In the instant case the prosecution adduced evidence to show that the police did the best they could to enquire into the alibi.

The learned Judges reviewed the evidence on record in light of the judgment and submissions made on behalf of the appellant and found no misdirection or misinterpretation in applying the burden of proof principle to the defence of alibi of the appellant. Thus appeal was dismissed.

DHURRY N v THE STATE 2016 SCJ 310 SCR 237

Hon. K. P. Matadeen Chief Justice & Hon. P. Fekna Judge & Hon. A. D. Narain Judge

Duty of Learned Judge go explain jurors, reasonable doubt

The appellant stood charged with the offence of having, on 25 May 2009, criminally, willfully and with premeditation killed one Asha Ramchurn in breach of **sections 215, 216, 217** and **223(1)** of the **Criminal Code**. He was tried before the assizes constituted of a Judge and jury. He pleaded not guilty to the charge and was found guilty by a majority verdict of the jury. He was sentenced by the learned Judge to undergo 40 years' penal servitude and to pay Rs 2000 as costs.

On the of the grounds of appeal was that the learned Judge failed to explain adequately the standard of proof, beyond reasonable doubt being a technical term which can easily be misinterpreted by lay jurors.

Counsel for the appellant argued that it was the duty of the learned Judge to explain to the jurors the legal concept of 'a reasonable doubt'. Thus, he put forward the proposition that the Judge should have brought to the attention of the jury that a reasonable doubt is not an imaginary or a frivolous doubt, nor is it a doubt based on sympathy or prejudice.

In Mauritius, as in the United Kingdom, it is trite law that a Judge directing a jury on the standard of proof must make it clear that the prosecution bears the onus of establishing the case against the accused 'beyond reasonable doubt'.

[1] Similarly, it is not sufficient for a Judge to say that the jury must be satisfied without giving any indication as to the degree to which the jury must be satisfied; [2] there is no need for a Judge to use any precise formula in trying to explain the term beyond reasonable doubt to the jury; [3] for the sake of consistency it is recommended, as a general rule, that Judges use the time-honored phrase that 'jurors must be satisfied beyond reasonable doubt' of the guilt of the accused before they return a verdict convicting the latter; [4] it is now well-established that, by way of an analogy or in order to explain the term beyond reasonable doubt, Judges very often use terms such as [i] the jury must be sure; [ii] the jury must be satisfied so that they feel sure; [iii] the jury must be completely satisfied; [iv] the jury must feel sure of the prisoner's guilt; or [v] the jury must be satisfied beyond reasonable doubt so that they feel sure of the guilt of the accused.

The crux of the matter was not the specific words used by the trial Judge in isolation to refer to the standard of proof but the effect of those words on the jury when they are taken in the context of the Judge's summing up as a whole.

Having considered the overall effect of the summing-up of the learned Judge to the jury, the learned Judges were of the view that there could have been no doubt in the minds of the jurors concerning the appropriate standard to which they had to be satisfied before returning their verdict. Thus, appeal was dismissed.

RAJBALLY A S v THE STATE 2016 SCJ 340

Hon. S. Peeroo Judge & Hon P. Fekna Judge

Sexual intercourse, contradictions, passage of time

The appellant stood charged on the following offences before

the Intermediate Court:

[1] under count I, of attempt upon chastity on a child under the age of 12 committed in breach of **section 249(3)** of the **Criminal Code**;

[2] under count II, of sexual intercourse with a minor under the age of 16 committed in breach of **section 249(4)** of the **Criminal Code**; and

[3] under count III, of attempt upon chastity committed in breach of **section 249(2)** of the **Criminal Code**.

He pleaded not guilty to all three counts. The learned Magistrate found him guilty and sentence him to undergo four years penal servitude under count I, seven years penal servitude under count II and three years penal servitude under count III.

One of the grounds of appeal was that the conviction of the appellant under counts 1,2,3 respectively were unsafe and should be quashed in view of: the nature of the testimony and the young age of the complainant; the fact that the alleged offences date, without certainty, as far back as 1995 for count 1, 1999 for count 2,2003 for count 3 and the declaration was made in Mauritius in 2010.

The version of the complainant was that she used to come to Mauritius from Réunion Island and that the offences took place when she was here. She stated that she was young when she was abused and did not report the case out of fear. However, after the third incident, she talked to a friend about the matter following which she felt comfortable and decided to report the matter to the police.

The complainant was 28 years old when she deposed in court. It is not uncommon for witnesses to give a version in court which, upon close scrutiny, is either inconsistent with or contains certain contradictions in comparison to statements made on previous occasions by him or her. If the contradictions or inconsistencies are on minor matters, or relate to peripheral issues or relate to matters unconnected with the case and do not affect the substance of the witness's testimony, the Magistrate can choose to discard or ignore those inconsistencies and contradictions; at the same time, if the substance of the testimony of the witness is credible on the whole, there is nothing wrong for the Magistrate to act on it to convict the appellant.

On the other hand, if the inconsistencies and contradictions are on matters of substance to such an extent that it would render a conviction unsafe, the Magistrate is in duty bound to reject the testimony of the witness and to give the appellant the benefit of the doubt should there be no other evidence to sustain a conviction.

Under all three counts when complainant deponed, she gave different versions. It was clear that there were marked differences when the two versions given by the complainant are compared. These inconsistencies and contradictions affect the very substance of the version of the complainant. Thus this goes on the overall credibility of the witness. In the circumstances, the risk that the complainant may be adding things to the strict truth is very real and the need for corroboration assumes all its importance.

One cannot disregard the effect that the passage of long periods of time between the commission of offences and the deposition of witness in court can have on the memory of a witness which in turn affects the nature of her testimony. Thus, the whole of the evidence of the complainant has to be seen in the light of the above in so far as it affects her credibility.

In the case of **Teeluck v The State [2014 SCJ 398]**, the Supreme Court held: "At this stage, it is apposite that we should remind Magistrates that it is not sufficient for them to quote the principles relating to acting on the sole testimony of complainants in sexual cases as a cliché. They must address their minds to the real risks of a miscarriage of justice and the rule relating to the requirement of corroboration must not be rendered nugatory because of an over-readiness to act on the uncorroborated evidence of complainants in sexual cases.

The circumstances surrounding the commission of the alleged offence, the motivation of the complainant, her past conduct, her propensity to lie or to invent as evidence by contradictions and inconsistencies, her psychological make-up and her previous involvement in sexual behavior are only a few of the matters that may have to be probed into before a pronouncement can be made as to whether the court can or cannot act on her uncorroborated testimony".

Therefore, the Learned Judges found that the convictions under counts I, II and III were unsafe. Thus, the appeal was allowed and convictions quashed.

ROHEE U D v THE STATE 2016 SCJ 319
Hon. N. Devat Judge & Hon. N. F. Oh San-Bellepeau Judge
Trial Judge, a finding involving both law and fact

The appellant was convicted for the offence of having willfully, unlawfully and fraudulently abstracted cosmetic products not belonging to her.

The undisputed facts before the trial Court were that on the material day the appellant was shopping at Winner's Supermarket with her son who was aged four at the time. She had taken some vegetables and 10 cosmetic products and placed them in a trolley but had also placed her laptop bag over the cosmetic products. When she reached the payment counter, she effected payment in the sum of RS 166.53 for the vegetables only and she then left the counter without paying for the cosmetics which were worth RS 2,500. She was stopped by a security officer and after verification it was found that the appellant had not paid for any of the cosmetic products found beneath the bag in her trolley.

Counsel for the appellant submitted that it was at the time that the appellant went through the payment counter that the element of intention became important and that in view of her version that she had to rush back and return, there could be no concomitance between the requisite intention and the act of abstraction.

However, it was submitted by the Respondent that the appellant knew or ought to have known that the 10 unpaid cosmetic articles were hidden and/or that she had hidden them herself under her laptop bag. The intention to abstract was proved since the appellant was the very person who had emptied the trolley and she ought to have ascertained that the trolley was completely empty.

The learned Magistrate chose to rely on the evidence adduced by the prosecution. The Learned Judges agreed with the findings of the Learned Magistrate and dismissed the appeal by quoting the following:

"Apart from cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations."

"He who knows, does not speak. He who speaks, does not know."

-Lao Tzu